

ARTICLE

# Imagined ideologies: Populist figures, liberalist projections, and the horizons of constitutionalism

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## Abstract

Most contemporary constitutionalists exhibit a highly critical attitude toward populism, seeing it as one of the main reasons for the “erosion” of liberal democratic institutions in a growing number of countries around the world. Other constitutional theorists, who are less hostile to the populist phenomenon, remain open to the prospect of a genuinely populist constitution. Irrespective of their differences, both camps take the existence of populism—itself a highly contested concept—for granted. In challenging this implicit consensus in constitutional theory about the actual existence of some observer-independent “populism,” this essay proceeds from two assumptions. One: like all political concepts, populism is a concept which, irrespective of the intentions of those who articulate it, has polemical implications. Two: like all polemical concepts, populism is a concept that must be “staged”. What that means are, again, two things. First, populism is staged because its meaning emerges against the backdrop of dramatized scenes that confront us with concrete political actors, impersonal technological tendencies, important historical events, elusive cultural atmospheres and broader socioeconomic landscapes. In most constitutionally relevant depictions of those scenes, populism emerges as a grave, if not yet existential, threat to liberal democracy. Which brings us to the second sense in which populism ought to be understood as “staged”: not just as an abstract concept propped up by concrete imaginings of protagonists, events, tendencies, and challenges, but as a stage-prop: a polemical device whose function is itself dramatizing. Portrayed as a “regime,” painted in dark colours, and situated in opposition to liberal democracy, populism is a figure whose role is to make the face of liberal democracy look more appealing. If so, there is no reason not to look at populism as a rhetorical distraction from other, potentially more fruitful questions such as: What are the actual institutional features of liberal democracy—not as some abstract template of legitimate government—but as a specific, historically mutable, socio-economic and psycho-social regulatory regime? In what sense do such regimes have a “constitution”? In whose interest are constitutional theories that remain indifferent to those regimes’ realities? Offering a fresh look at how liberalist critics of populism project this “ideology” or “regime” on a stage on which it appears as a threat to liberal democracy, this article offers a vantage point from which to begin systematically confronting these questions.

**Keywords:** populism; popular sovereignty; majoritarianism; constitutionalism; liberal(ist) imagination

## A. Imagined morphologies

“Ideologies,” Michael Freeden says, are “ubiquitous and permanent form[s] of political thinking.” As the maps of factual assumptions about the world and the “verbal and ideational practices of decontestation,” they “consist of affinities of meaning that are interpreted by their devotees as

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either ‘true’ or ‘plausible.’”<sup>1</sup> Ideologies, Freeden also says, are the “strategies for managing the underlying pluralism of political ideas in all societies, permitting it in culturally acceptable doses or trying to suppress it publicly and artificially.” They are also elaborately structured “morphologies” of concepts.<sup>2</sup> In terms of this view, every ideology has two dimensions: The horizontal, which allows us to locate its “core, adjacent, and peripheral concepts,” and the vertical, which allows us to look at those concepts in cross-sections distributed across three tiers, with concepts in the middle tier, surrounded by their “micro-components,” and “macro-conceptual concatenations,” fluctuating “at variable speed . . . over time and across space.”<sup>3</sup>

Seen from a perspective that allows us to put the totality of Freeden’s descriptive definitions of ideology within a single frame, however, “ideology” emerges as a strange, shape-shifting concept: A *form* of thinking that exists as a *map* of facts that is both a *practice* and a *strategy*, which, as a *morphology*, has three *zones* and three *layers*—no more, no less. Put differently: conceptualized as a conceptual morphology, this ideology is a montage of theoretical images:<sup>4</sup> *structures* (which may or may not be envisioned as morphologies); their conceptual *elements*; as well as a variety of background *images* that make these concepts imaginable and—from the perspective of those who consume them, or are consumed by them—plausible and sensible (if not irresistible). The character and the characteristics of these images are subject to speculation, which, in turn, requires imagining the imagination of others.<sup>5</sup>

Ideologies are the artifacts of imagination. They are the outcomes of a practice that is both social and intersubjective, as well as individual and subjective. Populism—perhaps the most intensely contested contemporary “ideology”—is no exception. To define it as a particularly noxious “moralistic imagination of politics”—as do some of its most influential theoretical detractors—will only be possible if one is also able to imagine the imagination of others. This immediately raises a simple, but important follow-up question: What, more specifically, must be imagined, and how, so that we end up imagining populism as a particularly toxic kind of “moralistic imagination”? In this Article, the answer to this question will reveal populism as the work of an imagination that is neither accurate nor inaccurate, nor is it simply unwaveringly committed to the ideals of liberal democracy. Instead, it will reveal populism as an artifact of an imagination, which in imputing a disfigured image of a sovereign people to those identified as “populists,” also reveals itself as something else: Not simply as liberal, or theoretical, but also as residually nationalistic, ambivalently cosmopolitan, compulsively groupist, and, ultimately, situationally indifferent.

The populism it ends up conjuring is not the populism of populists, but the populism of their antagonists. It is not a liberal, but a *liberalist* populism. Like all other “isms,” such populism is a relational political concept. Its meaning depends on how its theoretical conjurers imagine its relations to other ones in its immediate conceptual vicinity. As it will become gradually more apparent as we move through the sections B, C, and D of this Article, liberalist pluralism emerges

<sup>1</sup>MICHAEL FREEDEN, *The Morphological Analysis of Ideology*, in THE OXFORD HANDBOOK OF POLITICAL IDEOLOGIES 115, 116 (Michael Freeden et al., eds. 2013).

<sup>2</sup>*Id.* at 117.

<sup>3</sup>*Id.* at 124.

<sup>4</sup>This is true across the board, not only for the populism-hostile conjurations of populism, but also for those that are populism-sympathetic, or where populism may appear—as in the work of Benjamin Arditi—as at the “periphery,” “grey zone,” on “the edges of liberalism” (but still somehow beyond “a simple topography where space eventually morphs into place and distance becomes the sole basis for the distinction”). BENJAMIN ARDITI, POLITICS ON THE EDGES OF LIBERALISM: DIFFERENCE, POPULISM, REVOLUTION, AGITATION 3 (2007); see also Jiří Přibáň, *Constitutional Imaginaries and Legitimation: On Potentia, Potestas, and Auctoritas in Societal Constitutionalism*, 45 J.L. & SOC’Y 30, 31 (2018) (discussing generally the question of constitutional imagination and imaginaries).

<sup>5</sup>For a comprehensive exploration of how constitutional and other theorists imagine the protagonists, activities, scenes, and events that allow them to conceptualize the figure of a sovereign people and its most important attributes, such as, constituent power, ultimate authority, or self-determination, see ZORAN OKLOPCIC, BEYOND THE PEOPLE: SOCIAL IMAGINARY AND CONSTITUENT IMAGINATION (2018).

against the backdrop of concepts, which are *undefined* (popular sovereignty), *dichotomized* (democracy), *unrefined* (majoritarianism), or—as we will see later in the essay—unreflectively *confined* (constitutionalism). Such conceptualizations must be made credible, so for that to be done successfully its conjurers must evoke the actors, activities, scenes, and scenic backgrounds that will make their figures of populism appear as credible as possible. In doing so—as we’ll soon see in section E—the liberalist conjurers of populism rely on five Fs: Field-distortion, fiction-denigration, frame-preservation, failure-misidentification, and figure-fabrication. These five rhetorical moves allow the populism of the liberalists to appear as the work of more or less “detached” political theorists.

Section F complicates the constitutional(ist) side of this picture. Constitutionalism is not simply a natural ally of liberal democracy. Nor is it only its treacherous servant that stands ready to be enlisted by the forces of anti-liberal populism. Instead, as Neil Walker argues, constitutionalism is constitutively connected to both. It is destined never to achieve a lasting success in its attempt to make liberalism democratic and democracy liberal. Though mostly right, Walker’s account of the populism-constitutionalism nexus misses one important, meta-theoretical point. What puts constitutionalism between this rock and a hard place is neither liberalism, nor populism, but the unwillingness of contemporary theorists to move beyond the dichotomies that define the conceptual architecture of constitutionalism: Individual—collective, singular—plural, particular—universal.

Even at its most self-reflective and self-critical, contemporary constitutional imagination remains compulsively groupist, situationally indifferent, and polemically demoralized. To change that—first in thought, and then in deed—will require not only a new set of constitutional images, but also a more radical break with its ongoing fascination with the Schmittian conception of the political. A new conception of the political—as sections G and H explain—will need to be conceived as distinct, not from the non- or anti-political, but from another, thus far unarticulated category: The *constitutional*, which deserves an effort that increases the chances of its intended outcome to withstand in space, over time, beyond popular sovereignty and self-determination, and both in and for the world.

## B. Populism: Between empirical observations and theoretical definitions

Every theoretically articulated political concept first and foremost exists in the eyes of its theoretical imaginers. By way of example, consider Freeden’s definition of populism, as something that “ideologizes the ‘people’ as a stylized entity, and imagines democracy [as] the abstract rule of the people *en masse*, without the liberal and intricate constitutional trappings.”<sup>6</sup> Additionally, by “demoting the accoutrements of constitutionalism, it is precisely the de-pluralized, unreal and powerful word ‘people’, employed as a weapon of argument, riding roughshod over diversity counter-claims located in public political discourse, whether ideological, ethnic, religious or gendered, that enables some individuals to speak in its name.”<sup>7</sup>

But if populists inherit an already stylized figure of a sovereign people, how can they then imagine its “abstract rule . . . *en masse*?” If, however, they do the work of stylizing themselves (and if that’s a bad idea), then why is it not a good idea to do away with the “accoutrements,” and “trappings”? Though we probably shouldn’t make much of Freeden’s ironic choice of words, we should pause to consider what allows Freeden to utter them: An act of imagination, or his, however momentary, mental leap into the shoes of those from whose perspective the precepts of constitutionalism appear as “accoutrements.” The same is the case with probably the most influential liberalist conjuror of populism, Jan-Werner Müller. For Müller, populism is not simply an ideology but a particularly noxious “moralistic imagination of politics.”<sup>8</sup> It is a “way of

<sup>6</sup>Michael Freeden, *After the Brexit Referendum: Revisiting Populism as an Ideology*, 22 J. POL. IDEOLOGIES 1, 1 (2017).

<sup>7</sup>*Id.*

<sup>8</sup>JAN-WERNER MÜLLER, WHAT IS POPULISM? 19 (2016).

perceiving the political world that sets a morally pure and fully unified . . . but ultimately fictional—people against elites who are deemed corrupt or in some other way morally inferior.”<sup>9</sup>

But how does he *know* that? How can Müller know if most of those he labels “populists” do *actually* imagine *that*? If Müller himself is adamant that none of the “seemingly straightforward empirical criteria is helpful for conceptualizing populism,”<sup>10</sup> is there anything that would prevent us from reaching what seems to be the most sensible conclusion at this point? That is, that Müller’s own concept of populism cannot but be based on his own figurations of popular sovereignty, juxtaposed to those he imagined being imagined by others—in short, an imagined ideology.

The populism of Freedend and Müller is not only a conceptual byproduct of the way they imagine the imaginings of others. It is also the central point of their theoretical argument that is recorded in a linear form in a journal article or book. Thus recorded, populism is something that is textually inscribed with an intention to be read about, understood, and, hopefully, discussed. In critiquing it—as is the case with any other concept in political theory—our focus is on the empirical, interpretive, and logical discrepancies, not on the ways of seeing that made them possible.

This, of course, is rather obvious, but I mention this because theorists distract us from paying more attention to the constitutive role of their own ways of seeing. Those distractions may come in different forms. The most effective are those, such pre-emptive concessions that assure us of theorists’ awareness of the “essentially contested” character of the concept of populism.<sup>11</sup> What follows from the case of Cas Mudde and Cristobal Rovira Kaltwasser is not an exploration of the kinds of things that make such concepts contested “essentially” (and otherwise) but quite the opposite. What follows, instead, is a conventional attempt to offer an earnestly “clear” theoretical definition of populism—the one “able to both capture the essence of most of the political figures who are generally described as populist and yet distinguish between populist actors from non-populist actors.”<sup>12</sup>

Even if we set aside the question of *essences* of the building blocks of something that is *essentially* contested, one cannot but wonder if “generally described,” then by whom and where? Surely not by everyone, everywhere? To that, Mudde and Rovira Kaltwasser offer an indirect, implicit answer. “We position populism first and foremost within the context of liberal democracy . . . [a] choice is more informed by empirics and theory than by ideology. Theoretically, populism is most fundamentally juxtaposed to liberal democracy rather than to democracy per se or to any other model of democracy.”<sup>13</sup> But if populism is a concept that is seriously understood as “essentially contested,” should the authors’ attempts to approach it “empirically” and “theoretically” be considered as essentially contested as well, or perhaps even as an indication of their desire not to be taken so seriously? So there is another possibility. Perhaps Mudde and Rovira Kaltwasser don’t actually wish that their preliminary concession about the essentially contested character of populism be taken seriously. If that’s the case, what should then be taken seriously instead? The possibility of studying populism empirically, once we agree to define it “theoretically,” as juxtaposed to “liberal democracy”? Methodologically, there is nothing unusual in this conclusion. The function of theory, among others, is to postulate the existence of phenomena, and, in that way, orient, guide, and help organize empirical inquiry. On this view, then, a theory of populism is a theory for those who are either committed to the idea of liberal democracy in practice, or for those who are unwilling to reconsider the meaning of that idea in theory.

But what makes a populism an ideology that can be juxtaposed to liberal democracy theoretically, instead of an ideology of liberal democracy that needs a theory, so that it could be more

<sup>9</sup>*Id.* at 20.

<sup>10</sup>*Id.* at 12.

<sup>11</sup>CAS MUDDÉ & CRISTOBAL ROVIRA KALTWASSER, POPULISM: A VERY SHORT INTRODUCTION 2 (2017).

<sup>12</sup>*Id.* at 1.

<sup>13</sup>*Id.* at 2.

persuasive rhetorically, and influential politically? The aim of this Article is to explore where we might end up if we took this possibility seriously, and started not by assuming the existence of a distinctly populist imagination, but by the imagination of those who claim to have succeeded in articulating it theoretically: The liberalists.<sup>14</sup>

### C. The dichotomies of democracy and the vacuity of popular sovereignty

In order to make it persuasive, liberalists need to conceptualize populism either as the other of liberal democracy, or as the conceptual other of democracy. In the first case, populism will be associated with an impoverished, but still legitimate minimal understanding of democracy. Such democracy, according to Mudde and Rovira Kaltwasser is “the combination of popular sovereignty and majority rule,” understood as “a method by which rulers are selected in competitive elections.”<sup>15</sup> Within this scheme, populism emerges as “a thin-centered ideology that considers society to be ultimately separated into two homogeneous and antagonistic camps, ‘the pure people’ versus ‘the corrupt elite.’”<sup>16</sup> Within this scheme, the only democratic alternative—at least the only one that deserves an attention-grabbing adjective—is *liberal* democracy: A democracy “characterized by institutions that aim to protect fundamental rights with the intention of avoiding the emergence of a ‘tyranny of the majority.’”<sup>17</sup>

Müller’s populism, in contrast, presents itself as a conceptual other not to a particular understanding of democracy, but to democracy properly understood. It is a “degraded,” not just “minimal,” form of democracy.<sup>18</sup> As a result, his populism is not only “anti-elitist,” but also “always antipluralist,” hostile to diversity, and anti-egalitarian.<sup>19</sup> On closer look, however, Müller’s populism is not just any kind of random deformation of democracy, but rather its “permanent shadow.”<sup>20</sup> On even closer look, that democracy—the democracy in Müller’s view—can only exist as “representative”: A system designed to multiply the occasions in which “anybody can launch a representative claim and see whether a particular constituency is responsive to it” to the point of reopening “with entirely new terms the question of the people.”<sup>21</sup>

However adjectivized—as “minimal” or “liberal,” “deformed,” or “representative”—democracy of the liberalists remains a concept that will never end up theoretically contested *essentially*. Whatever its adjectives, their democracy will never become *democratism*. While this particular “-ism” hasn’t yet captured our imagination, notice how those that have may always be characterized in a wide variety of ways.<sup>22</sup> There are “-isms” and “-isms,” to put it differently. Some will be

<sup>14</sup>Calling them liberalists—assuming that they are not simply theorists but always also the producers and partisans of ideology—is a way to turn tables on them, an attempt to give them the taste of their own medicine. The productivity of this, obviously polemically-intoned rhetorical move is uncertain, but its objective is hardly unprecedented. In focusing on the liberalist imagination of populism, the overarching objective of this Article is to contribute to all that a number of theorists already pay lip service, but which in the end, they end up ignoring nonetheless: A more existentially self-reflective, situationally aware, stylistically experimental, and polemically honest ways to theorize—which is to say, envision—ideology. See also KARL MANNHEIM, *IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY KNOWLEDGE* (1979). For a suggestion to “attempt to fuse self-consciously and dialogically our scheme of understanding with that of another” in the study of ideology, see ANDREW VINCENT, *MODERN POLITICAL IDEOLOGIES* (2010). For a call for more “introspection,” see Michael Freeden, *Introduction, in THE MEANING OF IDEOLOGY: CROSS-DISCIPLINARY PERSPECTIVES* 1, 14 (Michael Freeden ed., 2015).

<sup>15</sup>MUDDE & ROVIRA KALTWASSER, *supra* note 11, at 80.

<sup>16</sup>*Id.* at 6.

<sup>17</sup>*Id.* at 81.

<sup>18</sup>MÜLLER, *supra* note 8, at 6.

<sup>19</sup>*Id.* at 20.

<sup>20</sup>*Id.* at 11.

<sup>21</sup>*Id.* at 68.

<sup>22</sup>See ANDREW VINCENT, *MODERN POLITICAL IDEOLOGIES* 292 (2010) (“Each and every skein of ideological concepts and values has its own iconography. Most skeins with ambitions to explain or understand usually claim that their iconography is not just another ‘ism’, but rather is the actual ontological nature of reality.”)

identified as ideologies (populism); others as the facts of life, or desirable conditions (pluralism); others yet as superior approaches to social organization (liberalism)—as opposed to those that will be seen as resilient systemic logics (capitalism), mass phenomena (nationalism), long-term aspirations (communism), intellectual doctrines (constitutionalism), personal dispositions (opportunism), or collective mindsets (radicalism). “We could also claim that populism’s core features—anti-elitism, people-centrism and popular sovereignty . . . are thin ideologies of their own standing. [W]ho is to tell?”<sup>23</sup> Indeed, who is to tell, especially if political actors, such as Beppe Grillo, who don’t refer to the people any more than the others, end up being labeled as populist? Hence, another possible genus of the “-ism” of populism: Neither an ideology, a logic, a phenomenon, a doctrine, nor a disposition, but an “epithet pinned on you by your political enemies.” It is “an insult; in a more cultivated form, a term of disparagement.”<sup>24</sup>

Such populism becomes an “ideology”—not a fact, logic, phenomenon, aspiration, or temperament—only once it’s implicated in a web of concepts. Some of those concepts will be explicitly postulated. Some will remain analytically undistinguished from others, left undefined, or simply alluded to in passing. Consider popular sovereignty. Though Mudde and Rovira Kaltwasser repeatedly return to populist imaginings of popular sovereignty throughout the book, they never pause to put forward their own—theoretical, and for the definition of democracy, conceptually indispensable—understanding of popular sovereignty. There is a variety of conceptions of popular sovereignty that are perfectly capable of lending legitimacy, not just to political regimes that feature periodic competitive elections at the central level of government, but also to a variety of one-party, or non-party regimes, which—in continuing to govern in the name of the people—compensate for the absence of central-level competitive representative democracy by opening up political space for democratic decision-making at lower scales and in different spheres of government. This has an important implication. Without such a more analytically elementary definition, we have no reason to accept their understanding of a concept which this definition co-defines. The concept in question is, of course, democracy.

#### D. Representative democracy and the meaning of majoritarianism

While majoritarian decision-making procedure may find its expression in “competitive elections,” there is no necessity for it in the context of municipal or workplace democracy. Nor is there any reason to think that those forms of democracy cannot be reconciled with the symbolism of popular sovereignty. While in Müller’s imagination populism exists as a set of moral claims that have no intrinsic connection with democracy, the allegedly populist vocabulary in Hungary, Poland, Venezuela, or the United States continues to uphold the intimate link between the ideal of popular sovereignty and democracy as the procedure of decision-making. The credibility of liberalist populism hinges not only on the acceptance of a vacuous conception of popular sovereignty and on a dichotomized conception of democracy, but also on a particular vision of democracy as a method of decision-making orthogonal to various democratic dichotomies.

The democracy in question is “majoritarian”—a strange qualifier to use, given the majoritarian character of all democracies that participate in the imaginative staging of populism. Majoritarian democracies, to put it differently, are not only those referred to as minimal, or direct, but also those defined as representative, liberal, or constitutional. And this is a problem for the liberalist conjurers of populism. They either must claim that the “populists”—such as Victor Orban, Beppe Grillo, or Matteo Salvini—are not genuinely committed to the ideal of majoritarian decision-making (something that would seem hard to swallow even by those who already already share those theorists’ commitment to liberal democracy). Alternatively, they must assert that there is

<sup>23</sup>Paris Aslanidis, *Is Populism an Ideology? A New Perspective Refutation and a New Perspective*, 64 POL. STUD. 88, 91 (2016).

<sup>24</sup>Marco D’Eramo, *Populism and the New Oligarchy*, 82 NEW LEFT REV. 5, 8 (2013).

something particularly egregious not in the idea of majoritarian democracy per se, but the theoretical ghost that haunts the debates about populism: *Majoritarianism*.

In this context, majoritarianism is something that salvages the distinction between populism and democracy without having to portray populists as being utterly cynical and opportunistic in their celebration of the will of the majority. Majoritarianism is a concept that allows scholars such as Nadia Urbinati to concede the obvious—that both populism and democracy share the “principle of the majority”—and still conceptualize populism as a “majoritarianist regime” that abandons “constitutional democracy for the sake of a further, more intense majority.”<sup>25</sup> In practice, this will lead to attempts to use elections to promote more intense identification of the governed by their governors and an increase in “impatience” with institutions and procedures whose task is to negotiate an ineradicable “tension between pluralism of social interests and unity of the polity.”<sup>26</sup>

Unlike Müller’s populist who simply claims to embody the will of a reawakened people, Urbinati’s demagogic populist will also feel compelled to demonstrate the truthfulness of his claim in the only way possible in a democracy: *Numerically*. Moralistic like Müller’s, Urbinati’s demagogic populism reveals itself as a regime of “extreme majoritarianism.” Such a regime is hostile towards “pluralistic political representation and the constitutional limitation of the power of the majority,” not simply because it relies on a wickedly self-righteous, and ultimately erroneous conception of the will of a sovereign people. It is also because it connects the authenticity of its manifestations with the size of the winning majorities, which, according to Urbinati, turns “minority views [into an] obstacle rather than a psychological component of the political game.”<sup>27</sup> Like Müller’s, Urbinati’s conception can be summarized in the following formula: Populism = violation of personal autonomy + the denial of political equality. Unlike Müller’s, the distinguishing characteristic of Urbinati’s populism not moralistic perception of the people and its sovereignty but demagoguery and its compulsive quest for credibility. This is why “a simple majority of votes [is] no longer enough” in the regimes that embrace populism as a ruling

<sup>25</sup>Nadia Urbinati, *Populism and the Principle of the Majority* in THE OXFORD HANDBOOK OF POPULISM 571, 572 (Cristóbal Rovira Kaltwasser et al. eds., 2018). Implicit in this claim is a further conclusion: If you are impatient with institutions, there is not only a great chance that you are a “populist” (which is already bad enough) but also a great chance that you might be something even worse: Someone, that is, who *simply doesn’t get it*. In the imagination of the liberalist conjurors of populism, to put it differently, populists are not only *callous villains*, but also *spoiled brats*. They are those, as Nick Barber put it in this volume, who “often speak in highly emotional language and are impatient with reasoned argument.” See NW Barber, *Some Thoughts on Populism and Political Parties* in this volume. What Barber seems to ignore is (a) that one might be impatient not with a “reasoned argument” but with something else; and (b) that the “argument” that one might be impatient with is “reasoned” only in the sense that the one engaging in it at some point or other declares: “These are my reasons.” Could it be that the thing that the alleged populists resent about liberal-democratic political class is not its abstract “elitism” but the unperturbed brazenness with which its members whisper sweet nothings into the ears of the already half-comatose “public.” (If you have hard time thinking of concrete nothings, just recall “*I take (full) responsibility!*”—that increasingly popular phrase among liberal-democratic politicians, which is followed not by the actual taking of an actual responsibility (by, say, resigning) but, in most cases, by exactly nothing. The implicature of this inane, but highly symptomatic, expression basically boils down to this: “OK, OK, OK, you said what you had to say, now could you all please shut up and go away and let me go back to what I was doing before you interrupted me.” In other words: Could it be that the “highly emotional language” is actually a belated allergic reaction to the overall *bullshittarian disposition*, of the contemporary liberal democratic regimes themselves? Too unseemly to be mentioned in a sober theoretical conversation, this disposition is perhaps best illustrated by Emmanuel Macron’s contrite speech from December 2018 in which he not only made concrete concessions to *gilets jaunes* but also sought to assure the members of the public that he hears their concerns. What Macron’s speech revealed, to put it differently, is what contemporary bullshittarian democracies nowadays ignore, trivialize, or suppress, but which they—once upon a time—obeyed willingly: Not the will of a sovereign people (which, in all likelihood, exists only in the heads of the liberalist conjurors of populism) but the force of public opinion. For the philosophical concept of “bullshit” see HARRY FRANKFURT, ON BULLSHIT (2005). For the historical account of the demise of (the government by) public opinion as a constitutional ideal in the United States and Britain, see John Gunnell, *Democracy and the concept of public opinion*, in THE OXFORD HANDBOOK OF AMERICAN PUBLIC OPINION AND THE MEDIA 269 (Robert Y. Shapiro and Lawrence R. Jacobs eds., 2011).

<sup>26</sup>See Urbinati, *supra* note 26.

<sup>27</sup>*Id.* at 579.

ideology.<sup>28</sup> But if intense majorities are too much, on what basis should we conclude then that simple majorities are just right?

Elsewhere, Urbinati answers this question by adapting Hans Kelsen's views on interpretation of majoritarian decision-making as a technique for achieving social compromise. On this view, "majority" ought to be understood as a formal prerequisite of political success. Here, its purpose is to incentivize an attitude of self-ironic detachment from one's own political attachments, which is precisely the opposite to the role it plays in the majoritarian regime of populism. But Kelsen's majoritarianism is not only a social technique, but also a democratic ideology that justifies the establishment of institutions whose task is to reduce the feelings of heteronomy to the minimum. Majority vote, in his opinion, serves this purpose by increasing the chances for the "accord between the individual will and the will of the state because [it makes] fewer . . . individual wills necessary for changing the will of the state."

Though Kelsen made a sharp distinction between the democratic ideology and social function of majoritarianism—claiming that the latter made the former inoperative—the two cannot be so easily separated. Even if we set aside the fact that there would be no need for democratic decision making if most people exhibited a critical relativist political attitude," and "consider[ed] not only their own, but also foreign, opposing opinions to be at least possible,"<sup>29</sup> a more important conceptual question still remains: Could majoritarianism ever hope to stimulate the development of such an attitude without respecting their opinions enough to make them count as such—considered and unconsidered, critical and uncritical, relativist and absolutist alike? In short: Social functionality cannot exist without the credibility of incentives, imaginable without according political dignity to the tendency toward unanimity as a democratic ideology that remains operative in social reality.

And while Müller enthusiastically quotes Kelsen's qualification of a sovereign people as a "metaphysical illusion," he ignores one important thing about his argument. Although Kelsen saw no difficulty in debunking the essentialist understandings of popular sovereignty, he had no problem defending majoritarian democracy not simply as reconcilable, but as fully compatible—in fact mutually constitutive—with the ideal of political equality. On that Kelsen was very clear. "If one attempts to derive the majority principle only from the idea of equality, it does indeed have that purely mechanical, even senseless, character . . . . That equality is naturally assumed to be a basic hypothesis of democracy is shown by the fact that not only this or that person is to be free, because this person is not worth more than that one; instead, as many as possible are to be free."<sup>30</sup> What exactly ought to be maximized or minimized, however, is not clear at all. For our purposes, the main point is something else. The ideal of political equality that anti-populist conjurers worry about should not be seen as a side constraint on the operation of the in-built institutional tendency to achieve the state of affairs in which "as many as possible are free." Rather, it ought to be seen as its epiphenomenon. It is an ideal that is legitimate only as the corollary of individual freedom and the imperative of its maximization.

Put differently: A Kelsenian understanding of majoritarian democracy qua popular sovereignty not only undermines Müller's carefully staged distinction between populist attitudes towards governing and the ideals of political equality, but also reveals the spuriousness of Urbinati's juxtaposition of populist majoritarianism to representative democracy. Though it is quite possible that "extreme," or "intense" majorities will be used by demagogues as the devices for authenticating the genuinely popular character of democratic decisions, as well as for catalyzing the identification of the voters with their democratically elected representatives, such majorities may, in principle, be extreme and intense in a number of different ways that do not conform to the either choice

<sup>28</sup>*Id.* at 581.

<sup>29</sup>Hans Kelsen, *On the Essence and Value of Democracy*, in WEIMAR: A JURISPRUDENCE OF CRISIS 84, 107 (Arthur J. Jacobson et al. eds., 2000).

<sup>30</sup>*Id.* at 87.



between populist majoritarianism and representative democracy. From that perspective, majoritarian “extremity” and “intensity” of majorities are imprecise allusions to the parameters in the protocols that define the reactions of institutions to the demands from below. To focus on their opportunistic exploitation is to miss an opportunity to ask: When and where is it extreme? How often? On whose initiative, and about what? To confront these questions is to confront neither majoritarian populism nor representative democracy, but the ways in which institutions may possibly react to a variety of different majorities: Local and national; triggering change or verifying it; consultative or binding; easily contestable or protected from challenge when “extreme” and “intense” is always a matter of more or less.

## E. The rhetorical staging of liberalist populism

Unlike democracy, which is majoritarian, majoritarianism is an “-ism,” whose main rhetorical objective, in this case, is not to contribute to a greater clarity of a theoretical concept. Rather, it is to allude to a politically toxic understanding of democratic decision-making. Though it might, its chief function here is not to insult or denigrate. Just as is the case with the invocation of “populism,” detecting the presence of some majoritarianism is a way to convey a more specific message: Whatever you say, you are not fooling me. I see what you’re trying to do. What the liberalist theorists of populism see, however, is only that which they themselves stage. What they put in the scene on which they then detect populism is, in fact, the outcome of five more specific moves. In this Article, I discuss them under the rubric of five F’s: Field-distortion, fiction-denigration, frame-preservation, failure-detection, and figure-fabrication. Their purpose is to render the liberalist conceptions of populism intelligible and sensible by immunizing it (to the extent that they can) from the charges of polemical partiality, empirical unsoundness, and methodological inconsistency. Populism as a theoretical concept owes its existence to these, and probably a number of other choreographic, scenographic and dramaturgical choices, which together nudge us to take the concept of populism for granted, as something self-evident, “as if we all know what is being referred to.”<sup>31</sup> In order to see what that means more specifically, we begin with the first anti-populist “F” which partakes in the imaginative constitution of liberalist populism.

### I. Field-distortion

In the imagination of leading anti-populist conjurors, such as Mudde and Müller, populists thrive only if they persuade others to imagine a social field organized around a vertical opposition: Between an underdog—the common people whose sovereignty lies in abeyance—and the elites who lord over it and exploit its inherent goodness, or gullibility. In focusing on the *vertical* opposition between the people and the elite, Mudde and Müller’s anti-populist conjurations of populism remain indifferent to the horizontal dimension of political antagonism. Horizontally, the distinction is not between the *people below* and the *elites up high*, but between the *people inside* a polity notionally governed in their name, and the *outside actors* who seek to frustrate, derail, paralyze, or corrupt the people’s will.

The liberalists, such as Mudde, Rovira Kaltwasser, Müller, or Urbinati make no distinction between the vertical and the horizontal dimensions in the imagination of populism. According to Rogers Brubaker, that is unfortunate because their combination would yield a more accurate, “two-dimensional vision of social space, defined by the intersection of vertical and horizontal oppositions.”<sup>32</sup> It is “the tight discursive interweaving” of those oppositions, says Brubaker, that provides the frame for the field of rhetorical opportunities to be exploited—each in their own way—both by the right-wing, as well as by the left-wing versions of populism.

<sup>31</sup>D’Eramo, *supra* note 24, at 5.

<sup>32</sup>Rogers Brubaker, *Why Populism?*, 46 THEORY AND SOC’Y 357 (2017).

In both cases, elites always have an external dimension. What makes them so obnoxious to a right-wing populist is not so much the advantage that they gain from their ability to game the system from the top, but rather their effete, cosmopolitan mannerisms, or their repulsive fascination with everything that comes from abroad. In the imagination of left-wing populists, the external dimension of populist antagonism remains but is infused with a different content. Here, the elites are those who are either materially betrothed, or, for whatever reason, unwilling to resist the diktat that comes from abroad, from international financial institutions, foreign banks, credit rating agencies, or ad hoc supervisory bodies such as troikas, contact groups, and so on. Finally, not only can elites be imagined in a variety of ways—depending on how we imagine their external dimension, but:

[T]he people [itself] can be defined not only in relation to those on top but also—still in the vertical dimension—in relation to those on the bottom . . . . Those on the bottom may be represented as parasites or spongers, as addicts or deviants, as disorderly or dangerous, . . . and thus as not belonging to the so-called decent, respectable, normal, hard-working people.<sup>33</sup>

Which brings us to fiction-bashing, the second, and perhaps the most curious, anti-populist “F.”

## II. Fiction-denigration

As the anti-populist conjurers of populism remind us, the pure people that stand against the corrupt elite make up a fictional, stylized entity. There is no such thing, they say. Instead, there is only what? This is a question that Mudde and Müller don’t address. But the answer is rather straightforward: Beyond the fictive populist people, there can only be another fictive entity: another sovereign people—a figure that allows anti-populist conjurers to pit populism against the allegedly correct understandings of democracy and popular sovereignty. At this point, it would be a shame not to pause to notice an interesting irony. In the anti-populist imagination of populism, populists are those who reify otherwise purely fictitious figures of collective political subjectivity.

Although anti-populist imaginers of populism imagine populists as treating fictions as facts, they do not propose something that would seem to logically follow: That those fictions—toxic as they are—be abandoned. Why not abandon these fictitious figures if they are so prone to be misunderstood and abused? Curiously, this possibility is not something that crosses the minds of anti-populist conjurers of populism. Could it be that it is them, too (and not just the populists whose imaginings they imagine) who approach the highly unrealistic stylizations of popular sovereignty with utmost seriousness, not simply as usefully evocative but as conceptually indispensable? Could it be, then, that the anti-populist theorists of populism also (quietly) believe that, unless we relied on some conjuration of a sovereign political community, we cannot possibly make sense of the ideals of human dignity, political equality, and collective autonomy?

If so, a particular way in which anti-populist conjurers of populism imagine (and then critique) the way in which the figure of a sovereign people appears in the populists’ imaginations is only plausible against the backdrop of another stylized fiction: Another sovereign people, or a figurative guarantee of the intelligibility, sensibility, and desirability of their own idiosyncratic understandings of democracy as constitutional, representative, and liberal. If imagined by a particular theorist, a sovereign people is a figure whose shape can never be determined randomly. If imagined theoretically, it must always conform to a pre-existing frame.

<sup>33</sup>*Id.* at 363.

### III. Frame-preservation

This brings us to the third F-move, *frame-preservation*. What this frame composes is a territorial container of a modern nation-state. What it enframes, more specifically, is a bounded place, the site in which constituent power is exercised by a spatiotemporally prefigured sovereign people. That frame is something that is taken for granted by populists and anti-populists alike, including the anti-populist conjurers of populism. In that sense, Müller is right when he portrays populism as “a permanent shadow of modern representative democracy.”

But the populist shadow that allegedly haunts contemporary constitutional democracies can only emerge if the territorial referent that allows the figure of a sovereign people to nest within it is not questioned. In his critique of populism, Müller comes close to admitting this. But instead of recognizing the political complicity of liberal democrats—who by perpetuating a territorially bound vision of popular sovereignty also perpetuate the figure of a sovereign people that can easily be mobilized by populism—Müller only charges them with a failure to recognize a particular problem.

In Müller’s imagination, that problem is at its base epistemic and conceptual, not political and distributional. At its root is not the ongoing flirtation of liberal democrats with nationalism and statism, but a conceptual puzzle for which a liberal democracy “has no real answer.” How should the people be constituted? How should we determine its legitimate boundaries in the first place?<sup>34</sup> The real political failure of liberal democracies, as Müller ultimately reveals, is not their inability to offer a compelling answer to a theoretical problem but the denial of inclusion—a moral scandal that the indifference to this problem is kept in the background of our political debate. Müller’s Address the boundary problem directly and allow “both existing members and aspiring members [to] have a say” in the process of democratic decision-making. The rightful membership in a political community, he says, “should be a matter of democratic debate, not a once-and-for-all decision based on unchangeable criteria.”

But who should have a final say in this debate? If it’s the liberal democratic, (good) populous, or those who are already included, how likely is it that they will ever change their minds about whom to include? In fact, the opposite is far more likely: A scenario in which those who somehow managed to insinuate themselves into the political life of a particular polity from abroad end up being accused of meddling, interfering, or corrupting that people’s otherwise blemish-free process of collective self-government. In this context, a sounder understanding of the proper role of the judiciary is neither here or there. To claim that such understanding “should revitalize the public discourse by making room for deliberations, inviting pluralism and including the narratives of dissonant voices that disagree with the prevailing narratives of progress and equality as nondiscrimination” neglects that no such understanding (even if we assumed for a moment that there is, indeed, such thing as “the proper role of the judiciary”) that would justify the current spatiotemporal *perimeter* of the proverbial public “sphere” within which public discourse ought to take place.<sup>35</sup>

In fact, one could argue that the proper role of the judiciary within the regime of liberal-democratic constitutionalism, is to keep gagging the most dissonant voices—by making them unintelligible to the ear of those who speak the language of mootness, ripeness, political questions, margins of appreciation, balancing, free and democratic society, and so on—not simply in order to perpetuate the hegemony of a particular worldview, but also in order to be able to then vindicate a

<sup>34</sup>This is as if that problem is an objective puzzle, or as if we cannot possibly imagine a legitimate liberal-democratic government in a bounded space without the figure of a sovereign people.

<sup>35</sup>See Andrea Pin, *The Transnational Drivers of Populist Backlash in Europe: The Role of Courts* in this volume (also for Pin’s honest description of Orban’s own relativization of the allegedly “illiberal” character of his conception of “democracy.” Read in its entirety (or actually *read*, instead of regurgitated in the second-hand form) “illiberal democracy” looks more like a momentary, self-indulgent dig at those who Orban holds in contempt, and not like an emergent, more-or-less articulate “ideology” of “populism.”

tiny number of others. By bringing some of those dissonant voices into the mainstream (usually those that don't cost much to accommodate, anyway) the proper role of the judiciary is to set the stage for the anti-populist liberals, and their solemn defenses of their increasingly sclerotic, disciplinary, and under-performing constitutional project: *Eppur si muove* in the right direction!<sup>36</sup>

#### IV. Failure-detection

One doesn't need to be a populist to understand that even if we included all those who wanted, or deserved, to be included in a particular polity, there is absolutely no guarantee that the polity in question would be able to escape the grip of what John P. McCormick called an "unremitting plutocratic usurpation."<sup>37</sup> In sum, Müller's solution to the failure of inclusion is a pseudo-solution. Among the five F's, it is the fourth rhetorical move: *Failure-detection and rectification*. In fixing one failure, Müller conceals, ignores, and suppresses another.<sup>38</sup>

Rather than speculating further on what prevents anti-populist conjurers of populism from inscribing the figure of the elite into the scenes of constitutional struggle, it is more important to detect what else appears in the scene in which elites exist as either populist exaggerations, or as populist fabrications. Those who act in those scenes—those who manipulate, breed resentment, intimidate, scapegoat—are, for the most part, populists. What others do is far less clear, and who they are is even less clear than that. In Müller's imagination, what confronts populism is not liberalism, globalism, cosmopolitanism, or constitutionalism. What confronts it is "technocracy"—something for which we cannot be sure what it really is: a state of mind, a political phenomenon, or an identifiable and effective political force.<sup>39</sup> According to Müller, "the two mirror each other. Technocracy holds that there is only one correct policy solution; populism claims that there is only one authentic will of the people." In fact, says Müller, recent times have seen technocracy and populism trading attributes, with the first increasingly moralized, and the second more and more businesslike—neither in a mood for democratic debate, and yet both "curiously apolitical" in their belief in the existence of "only one correct policy solution and only one authentic popular will respectively."<sup>40</sup>

At this point we'd do well to pause and ask a simple follow-up question. Where are all these technocrats? How much power do they have and how do they exercise it? How many among them are those known as "flexians" ("ultranimble players moving seamlessly among roles in government, business, think tanks, and media, advancing their own personal agendas and those of their associates, not the organizations, state, corporate, and otherwise they are paid to serve")?<sup>41</sup> Belonging to what social anthropologist Janine Wedel named as the "shadow elite," "[t]heir influence resides not so much in organizations but in social networks that operate in and around and connect them as well as in their ability to blend and blur official and private spheres." While

<sup>36</sup>For a masterful analysis of a three-step process that allows liberal-democratic regimes to "write a fantasy narrative" of integration, see Peter Gabel, *Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984).

<sup>37</sup>John P. McCormick, *Democracy, Plutocracy and the Populist Cry of Pain* (unpublished manuscript).

<sup>38</sup>Having said this, could it be that the usurpation McCormick speaks of is nothing but the figment of his, populist imagination? Larry Kramer, for example, argued that the picture of American legislators as "thoroughly unresponsive to those they represent and attentive only to private interests dangling campaign dollars before their eyes [has been] . . . exaggerated and overdrawn". See LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 239 (2004). But is it? Against the republican and liberal-democratic optimists, "when a majority of citizens disagrees with economic elites or with organized interests, they generally lose. Moreover, because of the strong status quo bias built into the US political system, even when fairly large majorities of Americans favour policy change, they generally do not get it." Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POLS. 564, 575 (2014).

<sup>39</sup>Müller, *supra* note 8, at 97.

<sup>40</sup>*Id.*

<sup>41</sup>Janine Wedel, *Rethinking Corruption in an Age of Ambiguity*, 8 ANN. REV. L. & SOC. SCI. 453, 498 (2012).

anti-populist conjurers of populism offer detailed descriptions of the *modus operandi* of specific populists—from Victor Orbán to Beppe Grillo—their conjurations of populism feature no comparable description of the political importance of the most prominent members of social political and economic elites—shadow or otherwise. In the United States, some of them, such as the Koch brothers, have over time come close to establishing a veritable para-constitutional branch of government: The tribunate of the rich, not of the poor.

Though at one point Müller concedes that “it’s hard to deny that [populist] attacks on elites can often be justified,” he never actually considers their existence worthy of further analytical clarification, let alone as a political problem of constitutional importance. What appears in the dramatized scenes in which we encounter Müller’s (and Mudde’s) populists is something else: Not another set of identifiable actors but a confluence of impersonal, subjective and objective processes. These include “frustrations” over the “transformations,” provoked by “integration and immigration.” Populist radical right parties emerged across the continent, though with different levels of electoral and political success. More generally, in order to be seen as an overall wicked ideology, populism, as a phenomenon, must be staged in a particular way. The scene in which it appears must be dominated by only one type of actor: Populists. It is they who act, and whose agency is constitutive of constitutional backsliding or democratic decay. Others, if they appear, play the role of extras. Their agency, in contrast, is not constitutive of anything. Unprovoked by anyone in particular, frustrations, transformations, integrations, migrations, trade liberalizations, and other, impossible to attribute, “-ions” just happen. It is against the backdrop of these processes—seemingly provoked, stimulated, perpetuated, nourished, and defended by no one and in the interest of no one (in particular). The anti-populist conjurers of populism engage in the activity of *figure-fabrication*, the fifth and final F-move in their rhetorical arsenal.

#### V. Figure-fabrication

In Müller’s imagination, for example, populists confront not only the elusive technocrats (bad), but also “democratic activists” (good). Unlike populists who aim to exclude those with whom they disagree from the body of the people, the main aim of Müller’s activists is inclusion in the processes of democratic decision-making from which they are unjustifiably excluded. While populists claim that “we, and only we, are the people,” their political demand—“we are also the people”—excludes nobody who deserves to be brought to the fold of democratic deliberation. Elites (“technocracy”) appear as something to worry about, but nothing more than that. In fact, a new social contract—the aim of which is “to bring in those currently excluded” to the fold of democratic decision-making—hinges on “keeping the very wealthy and powerful from opting out of the system.”<sup>42</sup>

Müller leaves unspecified what this keeping might involve. Still, it’s hard to believe that he would agree with John McCormick’s suggestion, for example, that “capital punishment should be reserved exclusively for wealthy citizens or public officials found guilty of political or economic corruption,” on the grounds that “[t]he risk of incurring such a penalty might perhaps be considered ‘the cost of doing business’ in a healthy social democracy, much like jury duty or paying taxes.”<sup>43</sup> It is also difficult to believe that Müller might embrace a properly cosmopolitan social contract: A constitutional scheme that could, in principle, offer one practical solution to the problem of inclusion, as well as a solution to the failures of modern constitutional democracies that anti-populist conjurations of populism ignore. One such problem is exploitation. For the most part, liberal-democratic conjurers of populism ignore it. Just as they ignore the threat of self-exclusion: Something that Müller seems to treat as the fact of life, and not as a problem that should, in principle, be dealt with at a global level.

<sup>42</sup>Müller, *supra* note 8, at 99.

<sup>43</sup>McCormick, *supra* note 38.

While the depth of factual disagreement over its existence, content, valence, and utility has rightly earned populism the status of an essentially contested concept, preceding sections have hopefully shown why. Take for example, pluralism. Seen as a state of affairs, we don't look at pluralism as one of the notorious "-isms": Communism, capitalism, socialism, or nationalism. Yet as a tacit apology for a particular constellation of political plurality, globally, pluralism is a term that has a distinctly ideological role. In the context of anti-populist imaginations of populism, it functions as part of the system of allusions that constitute a systemic, if under-articulated world-view: Residually nationalistic, oligarchy-tolerant, and ambivalently cosmopolitanism. Why else would Freedman, Mudde, and Müller denounce populist stylization of the political fiction of sovereign peoplehood, yet continue to uphold the very thing that makes their deplorable stylizations possible—another stylization of the very same political fiction of a spatiotemporally bounded, sovereign people?

Already laden with evaluative judgments, there is nothing in the structure of their notionally analytical descriptions of populism that could have prevented them from drawing the most obvious anti-populist conclusion: To leave the figure of a sovereign people aside, and articulate the ideals of constitutional democracy in a different way. It's that simple: No people, no populism.<sup>44</sup> Instead, the theoretical conjurers of populism argue that the real problem is not exploitation, but the lack of inclusion, as if there is any logical connection between more inclusion and less exploitation. As if adding more people to the 99% – turning it, in the process, into 99,5% – will make any difference when it comes to the oligarchic character of contemporary liberal democracies. In replacing one problem with another, their anti-populist conjurations of populism wouldn't be the same without their oligarchy-indifferent, residually nationalistic, ambivalent cosmopolitanism. Howling at the moon, or accusing the harsh sun of populist rhetoric for casting its deceptive shadow over modern democracies, they remain committed to their own fictional representation of a sovereign people, the very figure that makes that particular shadow possible. To the "populist cry of pain" they react like post-modern "Marie Antoinettes" with the 2019 version of "Let them eat cake!"—*Include them, so they can deliberate!*

## F. Conceptualizing constitutionalism (in relation to populism)

The remainder of this Article is not concerned with the symbolic efficacy of the imaginary of popular sovereignty on the ground. Instead, its concern is with the theoretical imaginings that shape the meaning of another "-ism": Constitutionalism. On a spectrum whose end points are marked off by the non-ideology of a desirable pluralism, on the one hand, and the ideology of a reprehensible populism on the other, constitutionalism is an "-ism" that sits somewhere in the middle. Widely recognized as intimately linked with the ideology of liberalism, most don't debate constitutionalism as an ideological construct itself. Widely seen as inseparable from the modern imagination of popular sovereignty, its possible kinship with the antagonistic, moralistic, and exclusionary logic of populism has been, until quite recently, either denied or ignored. Identifying the fact of this kinship is only possible at a certain level of analysis.

Consider Neil Walker's two-tiered definition of constitutionalism. At a more concrete level, "constitutionalism is... expressed instead in terms of a checklist of institutional accomplishments—judicial independence, free political parties, regular elections, basic freedom rights,

<sup>44</sup>While I problematize the designation "populist," I agree with Oran Doyle that "populist leaders" (if they existed as such) "can rely on prevalent understandings of constitutionalism," and on the "mainstream theories of constituent power" that have developed, as Doyle insightfully observes, "out of ambiguities in Schmitt's work." See Oran Doyle, *Populist Constitutionalism and Constituent Power* in this volume. What deserves to be said, nonetheless, is that the liberalists themselves are not much different. As I will show later in the text, they too must embrace some sense of the notorious "political." The alternative is something that they, in their residual nationalism don't wish to accept: An explicit, militant embrace of a post-democratic cosmopolitan democracy (*i.e.* "post-" in the sense of a democracy that is explicitly divorced from the "groupist" compulsions of contemporary constitutionalism).

separation of powers, inter-institutional checks and balances.”<sup>45</sup> “At the deepest level, [however] constitutional method becomes one of affirmation and balancing of the different general values and principles—or goods—implicated in the pursuit of political self-determination.”<sup>46</sup> Against the backdrop of such understanding of constitutionalism, populism appears as a “deeply ambiguous, promiscuously deployed, and chronically politicized concept,” it is also more than just a “discursive and stylistic repertoire.”<sup>47</sup> According to Walker, populism is best understood as “neither a surface distraction from other deeper trends, nor . . . wholly anomalous within our political tradition [but rather] a product of and response to a series of stress factors that are intrinsic to the modern constitutional condition.”<sup>48</sup> Rather than accidental, the connection between populism and constitutionalism is necessary, he says, since “populism assumes the concrete people are an empirically continuous entity, and so should have their wishes taken account of beyond the constituent moment.”<sup>49</sup>

Though Walker should be credited for insisting on this point in the context of populist challenges to the stability, legitimacy, and practicability of liberal-democratic constitutionalism, the first one to elaborate on that connection—albeit in a slightly different context—has been Bernard Yack.<sup>50</sup> In order to imagine the people as the ultimate source of political authority, whose constituent power is not legally predetermined, we cannot satisfy ourselves with the image of the people as an atemporal, territorially-defined community of citizens. To make the image of the people as the holders of an ongoing right to collective self-government credible, we must make it appear plausible that the people are the unconditioned holders of constituent power.

The people—our always potentially active sovereigns—are always on standby, always ready to spring into (constituent) action. In order to imagine that possibility, however, we need a different kind of figure: Not an atemporal, but a transtemporal collective subject. What we need, in other words, is not a formal political unity (unified in virtue of a common territorial referent), but a substantive political unity (unified by nothing other than an enduring sentiment, shared by those who identify with it). What we need, in short, is an ethnic nation. The result is an opportunistic, mutually facilitative marriage of political ideals, which, over time, revealed itself for what it is—a match made in hell. Having become the people’s alter ego, a nation inherits an unearned and unjustified indignation towards all those who do not conform to its will. Its fury—once intended for kings above and emperors outside—could now be rightly (and as a result, aggressively self-righteously) unleashed against the minorities in its midst. Or, as Walker puts it,

[T]he imagination of that people as a morally unified force that legitimates a morally dogmatic leadership in their name fails to entertain any genuine possibility of the people’s moral message being recognized as internally heterogeneous even when first issued, still less as having become diversified or significantly modified over time.<sup>51</sup>

That possibility remains unimaginable not only due to the rhetorically symbiotic, but also the politically toxic relationship between the democratic ideals of popular sovereignty and the national(istic) understandings of the right to self-determination. What keeps that possibility unimaginable—at an even deeper level—is also a number of interrelated, constitutive dichotomies.

The troubled kinship between populism and constitutionalism hinges on three such dichotomies in particular: (1) collective-individual; (2) universal-particular; and finally, (3) singular-plural.

<sup>45</sup>Neil Walker, *Populism and Constitutional Tension*, INT’L J. CONST. L. (forthcoming 2019).

<sup>46</sup>*Id.*

<sup>47</sup>Brubaker, *supra* note 33, at 357.

<sup>48</sup>Walker, *supra* note 46.

<sup>49</sup>*Id.*

<sup>50</sup>Bernard Yack, *Popular Sovereignty and Nationalism*, 29 POL. THEORY 517, 523 (2001).

<sup>51</sup>Walker, *supra* note 46.

In each instance, the relationship between the elements in a pair is Janus-faced: “[O]f mutual support as much as [of] mutual conflict or trade-off[,] [with] each . . . not only a challenge and corrective to the other, but also its precondition.”<sup>52</sup> More concretely, there is no community without individuals, just as there are no individuals in the absence of the communal preconditions of individuality. At the same time, such individuals may be more or less oriented towards the interests of a community, just as a community may be more or less sensitive towards the claims of individuality.

From the perspective of the first binary, constitutions are the vehicles of collective self-government, as well as the instruments of protection of individual rights. From the perspective of the second, they are the instruments of governing. In this case, their legitimacy depends on their conformity with the universalistic ideal of popular sovereignty. Ineluctably inscribed with universalistic ideals, constitutions are constituted. That is to say, the artifacts are put in place together wherever, but always somewhere particular. Finally, from the perspective of the third binary, constitutions are the devices for achieving singularity. Here, their task is to perpetuate that singularity’s unity. The only way in which they can do so is by acting as the shelters of plurality. Democratic constitutions do so directly and explicitly internally, while all constitutions do so indirectly and implicitly externally.

Together, these binaries set the parameters within which constitutionalism—as an operative doctrine, not to say ideology—must achieve its “precarious internal balance.”<sup>53</sup> What kept this precarious balance intact until recently was a constitutive double division of two realms that give meaning to the modern state-form: Inside-outside, and public-private. The emergence of populism, according to Walker, is the effect of the gradual, but increasingly palpable erosion of that balance under the influence of the “underlying forces of transnationalism and privatization.” What follows from this is a call for self-awareness and evaluative self-restraint. Liberal constitutionalists should realize that populism is not a pathological deviation from the otherwise inherently inclusive and participatory ideals of popular sovereignty. At the same time, populists should recognize the “one-sidedness of [their] own critique of the one-sidedness of the ‘liberal establishment.’”<sup>54</sup>

Like Mudde and Müller, Walker evokes the constituent power not of human agents, but of impersonal processes. If he is right about the deep structure of our constitutional vocabulary, we cannot move in that direction less because of our historical memory and more because of the three binaries that make such transition conceptually unintelligible. Nevertheless, this conclusion only holds, conceptually, that we accept that we cannot imagine the three binaries in any other way without losing in the process the intelligibility of the idea of constitutional government.

## G. Constitutionalism beyond compulsions

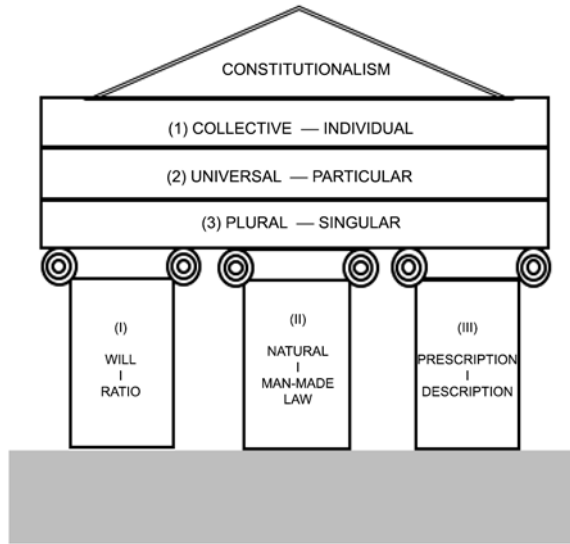
Walker’s schema looks less constitutive once we take notice of that which sustains the horizontal pairings—the three scale-dichotomies that constitute the conceptual home of populist-hospitable constitutionalism. They are three, for the most part, invisible pillars: The vertical dichotomies without which the vocabulary of individuals and communities, universals and particulars, or singularities and pluralities would immediately lose their intelligibility. As shown in the diagram below, these vertical dichotomies are: (I) *Will-Ratio*; (II) *Natural-Man-made Laws*; and (III) *Prescription-Description*. If the concept of constitutionalism were a temple—as depicted in the figure below—these vertical dichotomies could easily play the role of structurally indispensable pillars. In our imagination, many of us will see a natural connection between the following layers and pillars: (1) and (I), (2) and (II), and (3) and (III).

<sup>52</sup>*Id.*

<sup>53</sup>*Id.*

<sup>54</sup>*Id.*





In principle each of the three vertical binaries speaks to each of the horizontal ones. Instead of enumerating and elaborating on the propositions that follow from their encounter, what is more important is to explore the meaning of constitutionalism beyond them all. In principle, there are two ways of doing so: By starting with the horizontal, or by starting with the vertical binaries. In this Article, I will quickly pursue the second avenue by showing how the vocabulary of popular sovereignty and constitutionalism doesn't simply reconcile the tensions between the poles in (I), (II), and (III), but how it also suppresses the alternative that transcends them both.

In the context of (I), the interpenetration of will and ratio provides legitimacy to the ideal of popular sovereignty. On the one hand, democratic deliberation injects ratio into the will (of the people)—thus justifying its exercise morally. On the other hand, the essentially willful character of the acts of constitution-making imposes democratic, pluralistic, egalitarian, and humanistic restrictions on the, in principle unbound and always potentially imperialistic, application of governmental rationality. How else can we envision this happy union that gave birth to the presumptive legitimacy of the democratic will of a sovereign people? Is it possible to move beyond it—to break the first column in half, that is—without at the same time destroying the entire conceptual edifice of modern constitutionalism?

In this Article, my answer to this worry comes in the form of a summary of a longer argument, elaborated at greater length elsewhere.<sup>55</sup> Though juxtaposed, the two poles in the will-ratio binary both evoke unwavering commitments and clear cut off points: I either will something, or I don't. Either way, I won't immediately change my mind once I've made my decision. Or so we seem to believe, when we reflect on the decisions made by sovereign peoples—sovereign only because they are decisive. In our imagination, such peoples are unmoved by the anxieties, hopes, disappointments, and resentments of unruly multitudes, immune to the insistent prodding of their fickle desires.

In constitutional theory, we conjure the juxtaposition of *voluntas* and *ratio* not simply to set the stage for a theoretical justification of popular sovereignty. It is also because we wish to obfuscate, suppress, or even deny the role played by legal and political institutions constituted in the name of popular sovereignty. As Kelsen helped us realize, the figure of a sovereign people is more than just a dubiously useful fiction or a naively reified living collective entity. Beyond its polemical

<sup>55</sup>See OKLOPCIC, *supra* note 5, at Chapters 5, 7, and 8.

manifestations, the figure of a sovereign people provides an important institutional cover, by allowing them to modulate our diverse expectations in relative peace. The essence of that modulation is filtration: The periodic transformation of analog signals into digital signs, from ongoing, mutable, and manifold desires, coming from manifold individuals on the ground, into a digital representation of the will of the people (always in the form of some 0 or 1, yes or no, pro or contra, leave or remain).

If so, the happy union of will and reason can no longer be seen as a particular instantiation of a more general conceptual reconciliation where man-made laws conform to the normative ideals of moral (as a contemporary version of natural) laws, and where moral laws (in a legitimate political community) must be brought into existence by a popular sovereign, willing into existence the reasonable outcome of a democratic debate. Beyond them both we find institutional protocols, or the algorithms that define the workings of the institutional devices of desire-management. Defining the parameters of aspiration-filtration (in the name of the people), all such protocols share the same orientation: To contribute to the differential increase in the satisfaction of filtered aspirations. This has direct implications not only for the conceptualization of the relationship between the individual and the community but also for the conceptualization of the relationship between the universal and the particular.

For the most part, constitutional theory imagines their relationship as deeply ambivalent. On the one hand, we still tend to believe that the legitimacy of global constitutional particulars hinges on some higher regulative ideal that resides in the realm of the universal. For example, consider the right to self-determination, understood as a global legal entitlement in the vision of theorists of global constitutionalism. On the other hand, we also tend to imagine the legitimacy of these particulars with no explicit reference to the overarching universal because they emerge from the exercise of a sovereign, creative, surprising, idiosyncratic, and unrepeatably exercised local(ized) constituent power, not from the exercise of a global(ized) legal entitlement. They are legitimate not because they conform to the requirements of the universal but because their singularity makes them exceptional. On the basis of the preceding discussion, it shouldn't be too difficult to identify the alternative to both views: The particular as a particular recursive application of the same constitutive protocol of tendential responsiveness, singular in virtue of a unique constitutional purpose inscribed in its constitution.

Unlike the particular of Walker's account, this particular is not reaffirmed by two other binaries. It is a juridical individual (say, a state) only in virtue of an individuating constitutional protocol. It is a political community only for the purposes of anxiety-management to the extent it helps alleviate the worries about symbolic efficacy of the ideals we happen to cherish, from human dignity and political equality to democratic accountability. Such particular is an enterprise. It is an agentic structure devoted to the pursuit of specific goals that specify, and in doing so, qualify, and ultimately contribute to the conceptual dissolution of the vocabulary of popular self-government. In sum, the image that begins to appear once we move beyond the three horizontal and two vertical binaries is a picture of the world which is still universal and particular, singular and plural—but in a different way: An isomorphic pluriverse.

Many imaginative roads lead to this destination. As I suggested elsewhere, we'd travel more comfortably if we moved past the final vertical binary: Prescription-description. Like the first two vertical binaries this one also emerges as the result of a particular kind of suppression. In the first case, it is the anxiety of fragmentation (provoked by the image of delirium of insatiable desires), and in the second, it is the anxiety of indecision (provoked by the absence of a single, self-evidently applicable algorithm of tendential responsiveness). The anxiety constitutive of this binary—the affect sustains the affirmation of the prescription-description dichotomy, to put it differently—is the anxiety of creation that provokes the recoiling of responsibility for the purposeful, intentional, and ultimately constitutive character of observation.

This claim seems uncontroversial. An entity to which a theorist accords specific rights (from a normative perspective)—or which a theorist describes as having this or that quality (from an

ontological perspective)—must be first observed. What will end up being observed, however, is not dictated by perspectives, standpoints, or points of view. Rather than exhausting the possibilities for theoretical observation, these terms obliquely refer to one among manifold imaginative choices that define theorists' observation protocols. Lose your patience, and abandon the scene of an insurrection a bit too early, and you will see nothing but an unruly *mobile vulgus*. Stick around, and you will end up witnessing the constituent power of a revolutionary *populus*. Similarly, gaze at the situations in which the right to self-determination ended up being applied to a territorial conflict, and conclude that incommensurable conceptions of that right prevailed in the distinct periods during the modern era of popular sovereignty. Fast-forward through them, and witness how aggregate identifications improve over the entirety of the reconstituted territory in comparison to the constitutional *status quo ante*.

#### H. The concept of the constitutional

In looking beyond the three horizontal and three vertical binaries that structure the imagination of foundational constitutionalism, we have managed to boldly go where Mudde, Rovira Kaltwasser, Müller, and Urbinati have never gone before. Driven by a desire to explore new worlds beyond its horizons, we found ourselves in an uncharted territory. Outside the quadrant of constitutional democracy, confronted with the task of rethinking the meaning of constitutionalism anew. In doing so, we start from the assumption about the nature of constitutionalism. The “-ism” in question is not a more neutrally sounding ideology of liberal-oligarchic and national-capitalist form of government. Instead, we should define it more expansively as the apology of constitutions, which themselves merit a more thorough glance.

“Constitution”—as Günter Frankenberg observes, echoing Mudde and Rovira’s reflections on the nature of the term populism—is a “highly indeterminate and contested concept” whose “semantic atlas” contains a number of overlapping meanings: Of building, of composition, of disposition, of physique, of texture, as well as of—more technically—normative superiority and ultimate political authority.<sup>56</sup> To Frankenberg, “[t]his polysemy can be reduced somewhat if one disregards the composition, structure and make-up of things, and the health, strength and vitality of a body.”<sup>57</sup> For the purposes of this Article, however, this is exactly what we *shouldn't* do. In fact, constitutions seem to be particularly fit to be approached from the perspective of “structure and make-up of things,” and the perspective of the agency of “vital” bodies.

Clearly, constitutions are structures, organized around the principle of separation and division of powers, territorially, functionally, and normatively. From the normative point of view, these structures appear as hierarchies, with constitutions at the top of the hierarchy of legal norms. From the functional point of view, though, they appear as heterarchies, with each constitutional organ acting within its own sphere of competence. Finally, from the territorial point of view, constitutions may be seen as the structurations of nested jurisdictions. Here we speak of a Chinese box, a nested hierarchy. Clearly, constitutions are also the structurations of agency. Seen through the lens of agency, they are the products of the will of a macro-agent, a sovereign people; or, as the identifiable patterns of interaction between norm-makers and norm-takers, legal officials and ordinary citizens; or, more narrowly, the agents of executive, judicial, and legislative power. If so, constitutional theory may be seen not only as a body of thought that exists in a tense relationship with more traditional fields of political and legal inquiry, but also as the system of allusions to the rightful, desirable, practical, or in some other advantageous way to organize the relationship between structure and agency.

But, what is left of the normative core of constitutionalism once we have reenvisioned its different versions not as diverse institutional incarnations of the principle of popular sovereignty, but as

<sup>56</sup>GÜNTER FRANKENBERG, COMPARATIVE CONSTITUTIONAL STUDIES: BETWEEN MAGIC AND DECEIT 19 (2018).

<sup>57</sup>*Id.*

the diverse forms of desire- and anxiety-management? If constituting is an act that radically improves the chances that a purposive institutional framework will withstand, why should this be taken as a presumptive good, in the absence of a collective identity—be that as a people, or some other imagined political community? Shouldn't we want only worthy purposeful projects to withstand? Shouldn't we want new polities to be formed around ever more purposeful enterprises? Why help extant ones withstand by constituting them?

To envision a polity (*i.e.* a political community, a people, a community) as the epiphenomenon of a project—a combination of aspiration, orientation, institution, and anticipation—precludes us from taking what would otherwise be an easy way out: To embrace the conception of constitutionalism whose value lies in its capacity to “[lower] the normative horizon, [thereby] protect[ing] the polity from the pursuit of truth, whose intellectual and moral exigencies are too taxing” to bear. Instead, the conception of constitutionalism whose contours emerge in this Article hinges on a twofold belief. The first is that it takes time for purposeful projects to show their worth. Second is that creating structures that are systematic reminders of that fact is a worthy endeavour itself. That constitutionalism is not only “catachrestic,” as Gayatri Chakravorty Spivak once suggested,<sup>58</sup> but also melioristic. It is an instrument for the pursuit of the Better.<sup>59</sup> If so, every constitutionalism—not just the one of a “populist” kind, as claims David Landau—must be understood as an apology to an attempt to make a constitutive turn for the Better by “deconstructing the old institutional order, developing a substantive project rooted in a critique of that order, and consolidating power” in the hands of whoever happens to inscribe that substantive project into a constitution.

Such an idea hinges on its own specific conception of the constitutional, which is analytically distinct both from Carl Schmitt's concept of the political as well as from the thus far under-articulated conception of the legal. The political, according to Schmitt, has to do with the most intense organized antagonism of a unified entity willing and capable to defend its way of life. Other entities—those afraid of the “trials and risks of pursuing an independent existence—simply won't count as the embodiments of the political.<sup>60</sup> The political will cease to be the defining feature of an entity not only if it doesn't accept those risks unconditionally, but also if its acceptance of such risks results from calculation of odds. Is it worth it? To put it differently, this is a question that makes no sense from the perspective of a Schmittian conception of the political. It will be asked only by those who are already ready to consider moving beyond specific friend-enemy distinctions.

Many who denounce Schmitt's conception of the political still accept its main supposition. Even when they reject it on normative, or even ontological grounds, they do so without challenging its position in a polemical binary in which it stands juxtaposed to the legal, as a concrete manifestation of non-political. Seen from the standpoint of Schmitt's anti-positivist, liberal detractors, the legal is a defining mark of a legitimate legal order in which morality provides minimal content to legal norms. Both conceptions of the legal presuppose a structured process of norm-making: Mostly prospective, but always aspirational and anticipatory, always somewhere on the scale between more or less (more or less deliberative; more or less participatory; more or less inclusive, or whichever parameter ends up being used to evaluate the legitimacy of that process). Legitimacy is not the only defining concern here. Another one is sensibility, or the anticipations and aspirations that define the process of legislation that naturally summon calculation and prognostication. Laws are enacted if we publicly anticipate that doing so will be worth it concretely. Wars are waged irrespectively. An entity whose leaders would ponder, “Is it more advantageous for us to surrender,” cannot call itself political.

<sup>58</sup>Gayatri Chakravorty Spivak, *Constitutions and Culture Studies*, 2(1) YALE J.L. & HUMAN. 133, 144 (1990).

<sup>59</sup>David Landau, *Populist constitutionalism*, 85 U. CHI. L. REV. 521 (2017).

<sup>60</sup>CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 49 (1996).

Within this scheme, then, there is no place for an independent concept of the constitutional. Constitutional is that which affirms, facilitates, preserves, and otherwise upholds the concrete configuration of the political, or the organization of the political society of friends, ready and capable to confront their enemies, if need be, in a mortal battle. Constitutions enshrine the duty to defend the homeland no matter what. And if they don't explicitly, they always could. Liberal-democratic ones—as Paul Kahn pointed out—included this duty.<sup>61</sup> But then again, they might not. This is an important point, both for the purposes of this Article, and, I think, more broadly: Constitutions may constitute otherwise. The constitutional—in contrast to Schmitt's political—is the attribute of devices, institutions, and frameworks that define, and then configure the domain of the legitimately calculable. In principle, it is the attribute of the entities whose task is to make the reconfiguration of that domain difficult. Entrenching non-negotiable limits to aspirational calculability is an extra, an option parasitic on a very particular conception of the Political.

Under Schmitt's conception of the political, one is not only prohibited from inquiring into the specific purposes of a constitutional order (“What is it for?”), or into its (allusively) prognosticated advantages (“Will it be worth it?”). Instead, one is expected to suffer detriment in the name of a non-negotiable, backward- and inward-looking political project. The enemy that confronts the friends that are united in a political entity does not necessarily desire to annihilate them from the face of the Earth. Its defining characteristic is that it wants to “negate [its] opponent's way of life . . . his form of existence.”<sup>62</sup> Why is this important? Because we may always constitute a different kind of project, one that is forward and outward-looking. Our constitutions are instruments that need not serve only those who constituted them.

The constitutional that emerged up to this point is that which is left once we subtract Schmitt's political from the totality of situations in which a constitution may plausibly be understood as the outcome of the activity of constituting, but understood in a specific way: Preserved for posterity in its Latin origin: *Con-* + *-statuere*, or together-acting so that it can be said that result of our efforts has been caused to withstand. To cause something to withstand (or, more precisely, to nontrivially increase the chances that something will) is to anticipate that doing so will prove to have been worth the effort. In contrast to legislating, the valence of that anticipation is slightly different in the case of constituting. The anticipations that inform the acts of legislation are oftentimes situational and reactive. The anticipations behind the acts of constitution are that too. But they are more than that. They are a particular kind of constitutional moments, as they don't simply break the trajectory of constitutional time into the before and the after. They are turning points. Those who provoke them don't simply hope that in retrospect they'd be able to say, “It was worth it.” Rather, they hope for the better. We cannot know that. Even when it is not contested, it takes time for the better to appear—and even more to be recognized as such. In taking time, the better needs time.

And that is the second defining feature of the concept of the constitutional. The constitutional is the attribute of everything that serves the purpose of making time for the disclosure of something that matters as something that matters because it is for the better—better *than*, or simply better. Constitutions may do so, in principle, in a variety of ways. They may do so by organizing power in a particular way, by reminding their audience of specific foundational commitments, or by creating institutional mechanisms that immunize the system from external and internal threats. In doing so, constitutions will also radically diminish the ease with which the pursuit of a concrete better will be abandoned as the result of an opportunistic calculation. In doing so, nonetheless, constitutions don't extinguish the space for permissible calculation. Before we pass a constitutional amendment we will calculate the odds and prognosticate the outcomes just as we do before we pass an ordinary piece of legislation.

<sup>61</sup>See PAUL W. KAHN, *PUTTING LIBERALISM IN ITS PLACE* (2005).

<sup>62</sup>SCHMITT, *supra* note 61, at 27.

If so, one might argue that there is no principled difference between the acts of constitution and the acts of legislation—between the constitutional and the legal—from the perspective of background calculation. Still, the quantitative difference between the temporal horizon of legislation and the temporal horizon of constitution translates into the qualitative difference between the nature of their background anticipations. The former is, as I said, calculating: Technical, problem-solving, contextual, comparable, and disputable. The latter is not only more aspirational, but it is also more aleatory, even if the ideals we inscribe into a constitution are, by definition, not for sale. Even so, the act of constituting is the act of wagering—that pursuing our constitutional aspirations will be for the better.

### I. Beyond populism: Situational awareness and constitutional aspirations

This is a deeper meaning of Benjamin Franklin’s seemingly flippant answer to a definitional question: What was constituted in 1776, a monarchy or a republic? “A republic if you can keep it”—not simply a form of government, notionally juxtaposed to monarchy (or direct democracy), but also a form of government that is yet to become a republic in its, deeper, aspirational sense. Here, “republic” stands for something better, which, at the moment when Franklin evoked it, did not yet exist. Unfortunately, contemporary constitutional theorists ignore the register of constitution as a (hopefully) better, concretely purposeful configuration of institutions. On their view, constitutions remain the works of self-determining collectives who establish them by jointly exercising their inherent constituent power. So that what? So that they could remain self-determining, and for no other reason (in particular). This is the answer, more or less, of contemporary constitutional theory.

And yet even the most cursory glance at modern constitutions immediately reveals that this cannot be the entire story, and the constitution of a republic that Franklin referred to is perhaps the best example of that. Those who in 1787 adopted the Constitution of the United States of America did so for a specific purpose—“in order to establish a *more perfect* union” (not simply to set the condition for the “augmentation” of their liberty, as Hannah Arendt famously argued).<sup>63</sup> The problem here, I hasten to clarify, is not that constitutional theorists don’t register the concretely aspirational dimension of contemporary constitutionalism that transcends the standard dichotomies: Liberal-authoritarian, secular-theocratic, and so on. The problem, rather, is that they fail to take those concrete aspirations seriously.<sup>64</sup> By treating them as ethical orientations—hard to implement, easy to manipulate, and tricky to institutionalize—they fail to take them seriously as actionable prescriptions.

In doing so, they might also be ignoring an important connection between the effects of populism and the promises of constitutionalism. In the imagination of those who have addressed it explicitly, it is the nature of that connection that determines the limits to a more emancipatory vision of a constitutional order that facilitates “a more extensive, true realization of the popular will and the actual involvement of citizens in democratic rule.”<sup>65</sup> What frustrates this project are not simply the “exclusionary, even authoritarian tendencies in any attempt to define a unitary People.”<sup>66</sup> What frustrates it, as Paul Blokker’s argues, is a particular populist sentiment. Blokker calls it “a critical attitude [of] legal resentment,” or “a critical stance towards liberal and legal constitutionalism, and the latter’s juridification and rationalization of society,

<sup>63</sup>Hannah Arendt, *What is Authority?* in BETWEEN PAST and FUTURE 91, 123 (1968).

<sup>64</sup>See Marco Goldoni & Michael Wilkinson, *The Material Constitution*, 81 MOD. L. REV. 567 (2018) for the exceptions. See also Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models* (2003) 1 INT’L J. CONST. L. 293; Beau Breslin, *From Words to Worlds: Exploring Constitutional Functionality* 50 (2009). See also Gary Jacobsohn, *The Permeability of Constitutional Borders* (2004) 82 TEX. L. REV. 1763.

<sup>65</sup>Paul Blokker, *Populist Constitutionalism*, in ROUTLEDGE HANDBOOK OF GLOBAL POPULISM (Carlos de la Torre ed., 2018).

<sup>66</sup>*Id.*

manifesting itself in the downplaying of the constitution's status as a rigid, higher law."<sup>67</sup> To Blokker, such attitude may also be described as "constitutional instrumentalism," or an attitude that is often mobilized in the service of "narrow majoritarian or partisan objectives rather than the common good, or worse . . . for illiberal or non-democratic purposes."<sup>68</sup>

Blokker rightly points to the effects that shape our attitudes towards constitutionalism, representative democracy, popular sovereignty, and liberal legality. But how plausible is it to claim that what populists actually resent is juridification, societal rationalization, liberal constitutionalism, or some other theoretical abstraction? Blokker associates populists' version of "constitutional instrumentalism" with the narrowly majoritarian pursuit of partial objectives, but what objectives are not partial? Should our attitude towards such instrumentalism change if those objectives were not "narrowly," but more widely majoritarian? Moreover, does it make sense to insist on the instrumental character of populist visions of constitutional government, as if constitutions can be anything but instrumental, caused to withstand for a purpose. Could it be, in other words, that the origins of populist resentment lie somewhere else? In this Article, I can only answer these questions with another, speculative one: What if what (indirectly) sustains the cluster of political affects which theorists subsume under the rubric of populism is not only the oligarchy-indifferent, residually nationalist, and ambivalently cosmopolitan imagination of its theoretical conjurers, but also the impoverished, demoralized, quietist (and overall insufficiently situational) imagination of modern constitutionalism?

While Blokker's argument points in that direction, most recent attempts to confront the tangled relationship between populism and constitutionalism have yet to consider that possibility. When they are not preoccupied with imagining populism only to denounce it as its liberalist theorists, they look at it as a style, that "performatively devalues complexity through rhetorical practices of simplicity, directness, and seeming self-evidence . . . that valorizes common sense and first-hand experience over abstract and experience-distant forms of knowledge." From this perspective, populists are those who "not only criticize the rules governing acceptable speech [but those who also] relish violating those rules . . . [and] disrupt[ing] the conventions of polite speech and 'normal' demeanor."<sup>69</sup> This, seemingly more ecumenic, non-judgemental, and nuanced approach to populism is only superficially appealing, as D'Eramo rightly points out, because all it does is to "merely register[] its polysemy and return[] it to sender."<sup>70</sup> We saw earlier what happens then. A liberalist will pay lipservice to the essentially contested character of the concept of populism but won't really care about its polysemy one way or another. Nor will, for that matter, those whose on the ground populist style is described as boorish, vulgar, or aggressive. "Populist is used as an insult," Marco Salvini says, "but for me it is a compliment."<sup>71</sup>

But Salvini also says something else. "Listening to the people, being a minister that goes to the cities, to the squares, to the stations, to the hospitals, for me is a duty and a pleasure." Personal (dis)pleasures aside, liberal democrats would be mistaken to ignore such pronouncements. Boorish or cynical as they might be, there is nothing in them that makes them immanently antithetical to the ideals of liberal democracy, or, for that matter, constitutive of "populism." Though conceptually relevant for a more expansive understanding of constitutions and constitutionalism, Salvini's point remains untranslatable into the idiom of contemporary constitutionalism. The reasons behind this failure are probably deeper than the enduring proximity of constitutionalism to liberalism and capitalism. At a deeper level, it might have something to do with a particular way

<sup>67</sup>*Id.*

<sup>68</sup>*Id.*

<sup>69</sup>Brubaker, *supra* note 33.

<sup>70</sup>D'Eramo, *supra* note 25, at 8.

<sup>71</sup>Italy's Matteo Salvini says being called a populist is "a compliment," <https://www.cnn.com/2018/06/27/europe/matteo-salvini-interview-intl/index.html> (last visited Jan. 14, 2019).

in which modern constitutionalism configures the relationship between the scale of problematic situations on the one hand, and the constitutional structure and agency on the other.

That relationship will remain unexamined as long as constitutional theorists recoil from reflecting on the constituent power of their own gazes. Even when they take into consideration what seem to be the most important horizontal binaries that shape the deep understandings of constitutionalism, what escaped their attention is their complex relationship with the vertical ones: Will-reason, human-natural law, and prescription-observation. Treating observations as something that has nothing to do with the specific intentions and aspirations of theorists themselves, theorists of populism and constitutionalism miss an opportunity to problematize how *pouvoirs constitués* typically respond to social problems across a variety of situations. Perhaps that is why we continue to find it so natural to associate the states of emergency with existential, comprehensive threats to our imagined collective agency. While on the other side, we equally remain apprehensive of envisioning constitutional orders as the machineries that can be quickly mobilized, in their totality, in response to the abominable violations of human dignity locally, regionally, nationally, as well as globally.